

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNNY MARTIN,

Defendant-Appellant.

UNPUBLISHED

May 11, 2006

No. 259716

Wayne Circuit Court

LC No. 04-006762-01

Before: Schuette, P.J. and Bandstra and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for felon in possession of a firearm, MCL 750.224f; possession of a firearm during the commission of a felony, MCL 750.227b; and assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant was sentenced, as a second habitual offender, MCL 769.10, to two to five years' imprisonment for the felon in possession of a firearm conviction; five years' imprisonment for the felony-firearm conviction; and six to ten years' imprisonment for the assault with intent to do great bodily harm conviction. We affirm defendant's convictions, but remand for resentencing.

Defendant first argues on appeal that the trial court abused its discretion when it ruled that defendant's prior conviction could be used against him for impeachment purposes if defendant testified at trial. We disagree. Defendant did not preserve this issue for appellate review because he did not testify and the challenged evidence was not introduced at trial. *People v Gaines*, 198 Mich App 130, 131; 497 NW2d 210 (1993). Therefore, this Court's review is limited to a plain error analysis. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Under a plain error analysis, defendant must show that the error was plain; i.e., clear or obvious, and that it likely affected the outcome of the proceedings. *Carines, supra*, p 763.

Pursuant to MCL 600.2159, a witness's credibility may be impeached with evidence of prior convictions, but only if the convictions satisfy the criteria set forth in MRE 609. *People v Cross*, 202 Mich App 138, 146; 508 NW2d 144 (1993). MRE 609(a) provides that evidence that a witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross-examination and: (1) the crime contains an element of dishonesty or false statement; or (2) the crime contained an element of theft. Defendant was convicted of armed robbery in 1996. This Court has found that because armed robbery contains an element of theft, evidence of such a conviction is admissible under MRE 609 to impeach a witness if it satisfies the balancing test set forth in *People v Allen*, 429

Mich 558; 420 NW2d 499 (1988). *Cross, supra*, p 146. Therefore, defendant's prior conviction for armed robbery could be used for impeachment purposes if the court determines that the evidence is probative on the issue of veracity and its probative value outweighs its prejudicial effect. *People v Lester*, 172 Mich App 769, 772-773; 432 NW2d 433 (1988). "In determining the probative value the court is to consider only the age of the crime and whether the crime is indicative of veracity. In determining the prejudicial effect, the court is to consider the similarity of the prior crime to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant not to testify." *Lester, supra*, pp 772-773.

The trial court did not err in ruling that defendant's prior conviction could be used against him in the event that he testified at trial. Defendant's armed robbery conviction was less than ten years old; therefore, it was not too remote in time. The conviction contained an element of theft, which was probative on the issue of veracity. Credibility was an important factor in this case, and thus, defendant's armed robbery conviction went to his ability to testify truthfully. Because defendant's prior armed robbery conviction was dissimilar to the present charges, the potential for any prejudicial effect was minimized. Thus, the probative value of the conviction outweighed its prejudicial effect. When defendant's prior conviction is evaluated under the test set forth in *Lester*, the trial court did not err in its determination that defendant's conviction could be used against him.

Defendant further argues that the prosecutor improperly injected his personal beliefs into his closing argument. We disagree. Defendant properly preserved this issue for appeal by objecting to the statements at the time they were made. When properly preserved, claims of prosecutorial misconduct are reviewed by this Court de novo to determine whether defendant was denied a fair and impartial trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

Issues of prosecutorial misconduct are considered "on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of the defendant's argument." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). It is well settled that a prosecutor is "given great latitude to argue the evidence and all inferences relating to his theory of the case." *Thomas, supra*, p 456. However, a prosecutor may not appeal to the jury's sense of civic duty by injecting issues broader than guilt and innocence or encourage jurors to suspend their powers of judgment. *Thomas, supra*, pp 455-456. It is also improper for a prosecutor to "express a personal belief in the guilt of the defendant." *People v Farrar*, 36 Mich App 294, 299; 193 NW2d 363 (1971). This Court has also found that the "propriety of a prosecutor's remarks depends on all the facts of the case." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

The prosecutor did not engage in misconduct by making the statements, "he wanted to make a point" or "I think it's bigger than this." The prosecutor's statements, read in context, were not improper because here they were supported by the evidence. This Court has found that a prosecutor is "free to argue the evidence and any reasonable inferences that may arise from the evidence." *Ackerman, supra*, p 450. Even if the prosecutor's statements crossed the line, any minimal prejudice was cured by the trial court's instructions that the jury had to decide the case on the evidence and that the remarks of counsel were not evidence. *Thomas, supra*, p 456.

Defendant also argues that the trial court abused its discretion by qualifying Officer Donald Rem as an expert witness in the area of ammunition. We disagree. “Before permitting expert testimony, a trial court must find that the evidence is from a recognized discipline, relevant and helpful to the trier of fact, and presented by a qualified witness.” *People v Daoust*, 228 Mich App 1, 9-10; 577 NW2d 179 (1998). A witness may be qualified as an expert by knowledge, skill, experience, training, or education. MRE 702. This Court has found that a trial court may consider other trial experience in determining whether a witness should be allowed to testify as an expert. *People v Lewis*, 160 Mich App 20, 28; 408 NW2d 94 (1987). The prosecution laid a sufficient foundation to qualify Officer Rem as an ammunition expert. Officer Rem worked as a police officer for 27 years and was trained as an evidence technician. He has taken classes in ammunition, including informal classes given by the Bureau of Alcohol, Tobacco and Firearms; this training has covered different types of ammunition, such as low velocity, medium velocity and high velocity ammunition. Officer Rem has carried a handgun for 27 years, and testifies in over 100 cases a year on ammunition issues.

Defendant argues that Officer Rem should not have been qualified as an expert regarding weapons or ballistics, but the court did not qualify Officer Rem as an expert in any area but ammunition. The court clearly stated that Officer Rem was qualified to render his opinion regarding whether something appeared to him to be low velocity, medium velocity or a high velocity ammunition. Moreover, Officer Rem did not assert any expertise in the areas of ballistics or weapons. The trial court did not abuse its discretion by permitting Officer Rem to render his expert opinion regarding the ammunition used in the shooting because Officer Rem sufficiently established that he was trained and experienced in the area of ammunition.

Defendant’s last argument on appeal is that the trial court abused its discretion in its prior record variable two (PRV2) and offense variable two (OV2) scoring. “This Court reviews a sentencing court’s scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score.” *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). However, this Court reviews de novo any legal question involving the interpretation or application of the statutory sentencing guidelines. *People v Kegler*, 268 Mich App 187, 190; 706 NW2d 744 (2005). Defendant argues that his felony-firearm conviction cannot be scored as a separate conviction for purposes of scoring PRV2. Defendant argues that felony-firearm is not a low severity crime and it is not a crime listed in Class E, F, G or H for purposes of scoring PRV2. We agree.

The trial court was incorrect in its scoring of PRV2. Pursuant to MCL 777.52(1)(d), the court may score PRV2 at five points if the defendant has one prior low severity felony conviction. A prior low severity felony conviction consists of a conviction for a crime listed in offense class E, F, G or H. MCL 777.52(2). The prosecution argues that felony-firearm is a class G crime because it carries a mandatory sentence of two years’ imprisonment. However, because felony-firearm has a mandatory two-year sentence, it is not covered by the sentencing guidelines. Although felony-firearm is in the same group of offenses as carrying a concealed weapon, MCL 750.227, unlawful possession of a pistol, MCL 750.227a, and possessing a loaded firearm in or upon a vehicle, MCL 750.227c, these offenses are specifically classified as E, F, G or H crimes. MCL 777.16m. Felony-firearm is not specifically listed as a class E, F, G, or H offense, and therefore, a strict statutory interpretation of MCL 777.52(2) leads this Court to conclude that felony-firearm is not a prior low severity offense as defined by MCL 777.52(2).

Therefore, we conclude that the court incorrectly scored PRV2 at five points. Thus, defendant's PRV2 scoring should be reduced to zero and his PRV total should be reduced to 45 points. By reducing defendant's PRV total to 45 points his PRV level changes from level E to level D, which changes his minimum sentence guidelines range to 34 to 67 months, instead of 38 to 76 months. MCL 777.65. Therefore, we remand for resentencing. *People v Francisco*, __ Mich __; 711 NW2d 44 (2006).

Defendant also argues that the court improperly scored OV2 at 15 points. We disagree. The trial court was proper in scoring OV2 at 15 points because evidence exists to support the conclusion that defendant used a fully automatic weapon during the crime. MCL 777.32(1)(b). Defendant argues that because no weapon was recovered, it is impossible to determine what type of weapon was used in the shooting. We disagree. Pursuant to MCL 777.32(3)(b), a rifle is defined as a fully automatic weapon if it does not require renewed pressure on the trigger for each successive shot. Evidence was presented showing that defendant had a long, black gun at the time Latham was shot. Latham testified that defendant shot him with a gun about two and a half feet long. Witnesses Jervez Love and Kevin Cooper also testified that they saw defendant with a long, black gun during the shooting. Officer Rem testified that he recovered high velocity, high-speed ammunition from the crime scene. Although Officer Rem admitted that he was not a weapons expert, nor knowledgeable in ballistics, he maintained that the bottom of the casings recovered from the scene contained markings consistent with an assault type weapon. Evidence was also presented showing that the weapon used did not require renewed pressure on the trigger for each successive shot. Latham testified that he and defendant "tussled" over the gun and every time he tried to pull the gun back, the gun went off. Thus, the trial court did not abuse its discretion by scoring OV2 at 15 points because the scoring was supported by the evidence.

Affirmed as to defendant's convictions and remanded for resentencing. We do not retain jurisdiction.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Jessica R. Cooper